Supreme Court U.S.

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No. ____

IN THE

Supreme Court of the United States

IN RE: PETITION OF MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., AS OWNER OF THE TUGS IONA MCALLISTER AND JAMES MCALLISTER

McAllister Towing and Transportation Company, Inc. and Owl International, Inc. d/b/a Global Associates, Joint Petitioners

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this admiralty case, the Court of Appeals for the Third Circuit, in dismissing petitioners' third-party claims against the United States, limited this Court's ruling in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), and thereby reopened a conflict among the circuits that *Lockheed* had settled. In *Lockheed*, this Court held that the exclusivity provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), which provides first-party immunity for the United States where it pays compensation to its injured employee, "does not directly bar" third-party claims. In so defining the scope of FECA's immunity and confirming that FECA did not disturb settled principles of maritime law, this Court sided with a decision of the Fourth Circuit that the Third Circuit in this case rejected as "unpersuasive" and "counter to the weight of authority." The Third Circuit followed a Fifth Circuit decision that held that although FECA does not "directly" bar third-party contribution claims, it may operate to "indirectly" bar such claims.

The question presented is:

Did the Third Circuit err in holding that FECA's grant of first-party immunity to the United States also bars an otherwise valid and conventional claim in admiralty for third-party contribution and tort indemnity against the United States?

CORPORATE DISCLOSURE STATEMENT

Neither petitioner McAllister Towing and Transportation Company, Inc. nor petitioner Owl International, Inc. d/b/a Global Associates has any parent corporations, nor are there any publicly held companies that hold 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, McAllister Towing and Transportation Company, Inc. ("McAllister") and Owl International, Inc. d/b/a Global Associates ("Global"), pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on December 21, 2005.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania granting the United States' motion for judgment on the pleadings, dated September 9, 2004, is reported at 2004 WL 2009330 and appears at App. 24. The panel

opinion of the Court of Appeals for the Third Circuit affirming the district court, filed December 21, 2005, is reported at 432 F.3d 216, and is reprinted at App. 3.

JURISDICTION

The Court of Appeals entered judgment on December 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The exclusivity provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew or a vessel.

STATEMENT OF THE CASE

1. Jurisdiction Below.

The district court had jurisdiction based on the admiralty jurisdiction of the federal courts, the Suits in Admiralty Act, 46 App. U.S.C. §741, *et seq.*, and the Public Vessels Act, 46 App. U.S.C. §781, *et seq.* After the district court entered judgment in favor of the United States, McAllister and Global timely filed appeals in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(3), which provides for jurisdiction over appeals from interlocutory decrees of the district courts in admiralty cases that decide the rights or liabilities of a party. *See, e.g., Petroleos Mexicanos Refinacion v. M/T KING A (Ex-TBILISI)*, 377 F.3d 329, 336-37 (3d Cir. 2004).

2. The Facts of the Case.

The facts of this case are not materially at issue, as the matter was disposed of on the government's motion for judgment on the pleadings. The case arises out of injuries suffered by Todd Bruemmer, a civilian merchant seaman in the employ of the United States of America. Mr. Bruemmer was a crew member aboard the USNS MOHAWK, a vessel owned by the government and operated in service to the United States Navy. The United States had planned to tow a retired vessel, the ex-USS GUADALCANAL, from its berth in Philadelphia to the James River in Virginia. The USNS MOHAWK was assigned to do the towing. Petitioner Global, the agent or contractor for the United States, enlisted the services of petitioner McAllister and others to assist with the towing operation. During the course of the attempted

tow, Mr. Bruemmer was struck by a broken portion of the MOHAWK's towing gear assembly and suffered severe personal injuries.

The accident quickly was determined by the Navy to be the fault of the United States. The Navy issued a report that concluded that the "accident was caused by a series of errors in judgment made by Captain Wanzor, Master, USNS MOHAWK." The Navy report did not fault any other party.

Nevertheless, Mr. Bruemmer and his wife filed an action in the Pennsylvania Court of Common Pleas, Philadelphia County, naming McAllister and certain individual vessel pilots, seeking damages for Mr. Bruemmer's injuries. The Bruemmers did not name the United States as a defendant, presumably because the United States paid compensation to Mr. Bruemmer and enjoys immunity from claims by its injured employees under the provisions of FECA. Upon initiating a Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Eastern District of Pennsylvania – an action that resulted in a district court order restraining the state court suit – McAllister filed third-party claims against the United States for contribution and indemnity. Global, which had been impleaded, also asserted cross-claims against the United States.

3. The District Court Proceedings.

The United States moved the district court, pursuant to Fed.R.Civ.P. 12(c), for judgment on the pleadings. The government contended that all third-party claims against it were barred because FECA "prohibits claims for contribution and indemnity derived solely from the government's alleged status as